

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHAEL GOMES, et al.,
Plaintiffs,
v.
EVENTBRITE, INC., et al.,
Defendants.

Case No. [5:19-cv-02019-EJD](#)

**ORDER GRANTING MOTION TO
INTERVENE; CONTINUING
HEARING DATE FOR MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT**

Re: Dkt. Nos. 62, 65

This action arises out of Defendants' alleged violations of Section 11 and 15 of the Securities Act of 1933, Item 303 of SEC Regulation S-K, and Section 10(b) and 20(a) of the Securities Exchange Act of 1934. Presently before the Court are: (1) Lead Plaintiffs Michael Gomes, Melvin Pastores, Mohit Uppal and Bruce Bones's (collectively "Plaintiffs") motion for preliminary approval of class action settlement ("Motion"); and (2) Eventbrite shareholders Crystal L. Clemons and Christina Cotte's motion to intervene for the purpose of requesting a 90 day continuance of the hearing on the Motion. Both motions are scheduled to be heard on October 29, 2020. For the reasons stated below, the Court will grant the motion to intervene and continue the hearing date for Plaintiffs' Motion.

I. BACKGROUND

A. Federal Court Suit

Plaintiffs initiated this suit in April of 2019. Dkt. No. 1. The crux of the suit is that Defendants allegedly made misleading statements to and concealed known risks from investors

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about Eventbrite’s acquisition and integration of Ticketfly, LLC. Plaintiffs purchased Eventbrite securities during Eventbrite’s September 2018 Initial Public Offering (“IPO”). The Class Period is between September 20, 2018 and May 1, 2019. The case was related and consolidated with another suit. Dkt. Nos. 9, 36. Plaintiffs filed an amended complaint on December 11, 2019. Dkt. No. 42.

By order dated April 28, 2020, the Court granted Defendants’ motion to dismiss with leave to amend. Dkt. No. 59. Plaintiffs elected not to file a second amended complaint. The parties reached a settlement in principle less than two months later on June 17, 2020, and on August 7, 2020, Plaintiff filed the instant Motion for approval of the proposed \$1.9 million settlement. Dkt. No. 62.

In the Motion, Plaintiffs refer to a securities class action against Eventbrite in San Mateo Superior Court captioned *In re EventBrite, Inc. Shareholder Litig.*, No. 19civ2798 (“State Court Action”) and indicate that the case was dismissed on June 23, 2020, following “significant discovery.” Dkt. No. 62 at 12.

The proposed settlement agreement includes a release that covers the Securities Act claims at issue in both the instant federal court action and the State Court Action, as well as a release that covers the Exchange Act claims only at issue in the federal court action. Dkt. No. 66 at 6. No oppositions to the Motion have been filed and Defendants do not oppose the Motion. Dkt. No. 64.

B. Intervenorors

The intervenors are plaintiffs in the State Court Action (“State Court Plaintiffs”). They seek to intervene under Federal Rule of Civil Procedure 24 for the purpose of requesting a continuance of the hearing on the Motion until after the California State Court rules on any demurrer to the State Court Plaintiffs’ second amended complaint, which State Court Plaintiffs estimate will take approximately ninety days.¹ State Court Plaintiffs assert the proposed

¹ State Court Plaintiffs intend to propose the following schedule: amended complaint by November 6, 2020; demurrer by December 7, 2020; hearing on or about December 30, 2020. *See* Molumphy Decl. in Support of Reply, at ¶5 (Dkt. No. 69-1).

1 settlement purports to resolve all claims, including their own, and yet it was secretly negotiated
2 without any notice to them or to the State Court. As a result, State Court Plaintiffs believe that
3 they are impacted by the proposed settlement and that their interests are not adequately
4 represented in the federal action.

5 State Court Plaintiffs further assert that Plaintiffs have misrepresented to this Court that the
6 State Court Action was dismissed, when in fact it has not been. State Court Plaintiffs explain that
7 San Mateo County Superior Court Judge Marie S. Weiner upheld State Court Plaintiffs' standing
8 under § 12(a)(2) of the Securities Act of 1933 ("Securities Act"), the allegations of "seller"
9 liability under § 12(a)(2), as well as "control person" allegations under § 15 of the Securities Act.
10 Judge Weiner also granted State Court Plaintiffs leave to amend their complaint and allowed them
11 to take further discovery.

12 After learning of Plaintiffs' settlement of the federal court action, on September 23, 2020,
13 Judge Weiner lifted all stays on discovery and ordered Eventbrite to produce significant discovery
14 by October 16, 2020. *See* Molumphy Decl., Ex. 3 at 2 (Dkt. No. 65-1). Notably, Judge Weiner
15 also stated in her order that "the [Motion] by the federal plaintiffs *misleadingly* tell the federal
16 district judge that this Court has 'dismissed' the claims asserted in this state court action, and
17 implies that Plaintiffs had full opportunity for discovery-and that this is one of the reasons why the
18 settlement amount is so low compared to potential damages." *Id.* at 11 (emphasis in original).
19 Notwithstanding Judge Weiner's characterization of the Motion, Plaintiffs here insist they
20 accurately described the status of the State Court Action in their Motion. Dkt. No. 67 at 18.

21 The State Court Plaintiffs move to intervene for the limited purpose of requesting a
22 continuance the hearing on the Motion until after the California State Court rules on any demurrer
23 to the State Court Plaintiffs' second amended complaint.² State Court Plaintiffs' stated purpose in
24

25
26 ² State Court Plaintiffs' counsel asked Plaintiffs to voluntarily defer the hearing on the
27 Motion, but Plaintiffs refused. Molumphy Decl., Dkt. No. 65 at 9-10.

1 seeking intervention is straightforward. State Court Plaintiffs assert that this Court and the
 2 Eventbrite stockholders on whose behalf the federal action is prosecuted deserve to know whether
 3 the California State Court Plaintiffs' claims are upheld in the State Court Action before any
 4 decision on the Motion. In the alternative, State Court Plaintiffs ask the Court to require Plaintiffs
 5 and Defendants to amend the notice of the proposed settlement to identify the pendency and
 6 procedural posture of the State Court Action so that Eventbrite stockholders have full information
 7 when deciding whether to opt-out or object. As a third alternative, State Court Plaintiffs assert
 8 that it would be within the Court's discretion to deny the Motion on the basis that the proposed
 9 settlement is not fair, adequate, or reasonable.

10 In response, Plaintiffs asks the Court to (i) deny the State Plaintiffs' motion to intervene,
 11 (ii) treat the State Plaintiffs' motion to intervene as an objection to preliminary approval of the
 12 Settlement, (iii) overrule State Plaintiffs' objection, and (iv) preliminarily approve the Settlement.
 13 Defendants also oppose the motion to intervene.

14 **II. Legal Standards**

15 In the Ninth Circuit, there are four requirements for intervention as of right under Federal
 16 Rule of Civil Procedure 24(a)(2): (1) the application for intervention must be timely; (2) the
 17 applicant must have a "significant protectable interest" relating to the property or transaction that
 18 is the subject of the action; (3) the applicant must be so situated that disposition of the action
 19 may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4)
 20 the "existing parties may not adequately represent the applicant's interest." *Donnelly v. Glickman*,
 21 159 F.3d 405, 409 (9th Cir. 1998). These requirements "are broadly interpreted in favor of
 22 intervention." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir.
 23 2011). Alternatively, Rule 24(b) allows for permissive intervention. "[P]ermissive intervention
 24 requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common
 25 question of law and fact between the movant's claim or defense and the main action." *Freedom*
 26 *from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011).

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III. DISCUSSION**A. Timeliness**

Neither Plaintiffs nor Defendants object to the motion to intervene as untimely. As such, this case is distinguishable from a few of the cases relied upon by Plaintiffs and Defendants in opposition to the motion to intervene. *See Cody v. SoulCycle, Inc.*, 2017 WL 8811114, at *4 (C.D. Cal. Sept. 20, 2017) (post preliminary approval of settlement, denying motion to intervene as untimely and for failure to show impaired interest); *Lane v. Facebook, Inc.*, 2009 WL 3458198, at *3 (N.D. Cal. Oct. 23, 2009) (“Accordingly, the motion for leave to intervene would be denied as untimely even if it otherwise had merit.”); *Cohorst v. BRE Props., Inc.*, 2011 WL 3475274, at *6 (S.D. Cal. Aug. 5, 2011) (post preliminary approval, denying motion to intervene as untimely and where proposed intervenor could “opt-out of the class and pursue her own damages action against Defendants . . . [or] raise any objections to the settlement at the time of the Final Hearing”).

B. “Significant Protectable Interest”

State Court Plaintiffs possess a significantly protectable interest by virtue of being members of the class in the federal suit. *See, e.g., Cicero v. Directv, Inc.*, 2010 WL 11463634, at *4 (C.D. Cal. Mar. 2, 2010) (“As both Proposed Intervenors are member of the class, they have significant protectable interest relating to the subject of the instant action.”).

C. State Court Plaintiffs’ Impaired or Impeded Ability to Protect Interest

The primary dispute centers on the third requirement for intervention as a right: that the applicant must be so situated that disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect that interest. *Donnelly v. Glickman*, 159 F.3d at 409. In the context of settlements, courts have frequently denied intervention by putative class members where they can adequately protect their interests via the Rule 23 opt-out mechanism. *See, e.g., Zepeda v. PayPal, Inc.*, 2014 WL 1653246, at *5–6 (N.D. Cal. Apr. 23, 2014) (holding that intervention was not warranted because putative interveners may object to the settlement or opt out of the class and there was a failure to show inadequacy of representation); *Cicero*, 2010 WL

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1 11463634, at *2 (“the proposed settlement terms make clear that any class member has the right to
 2 opt out and object before final approval”); *Alaniz v. Cal. Processors, Inc.*, 73 F.R.D. 269, 289
 3 (N.D. Cal. 1976) (“the ability to opt out precludes the Intervenor from satisfying the impairment-
 4 of-interest test.”); *Grilli v. Metro. Life Ins. Co.*, 78 F.3d 1533, 1536–38 (11th Cir. 1996) (affirming
 5 denial of intervention in class action because intervenors could object to the settlement or opt out);
 6 *Davis v. J.P. Morgan Chase & Co.*, 775 F. Supp. 2d 601, 605–06 (W.D.N.Y. 2011) (same); *In re*
 7 *DHB Indus., Inc.*, 2007 WL 2907262, at *2 (E.D.N.Y. Sept. 30, 2007) (same); *Gallucci v. Boiron,*
 8 *Inc.*, 2012 WL 12864924, at *2 (S.D. Cal. Apr. 25, 2012) (same).

9 Unlike the cases cited above, however, State Court Plaintiffs assert that they cannot
 10 effectively object or consider whether to opt-out of the settlement while the State Court Action is
 11 still pending. This Court is persuaded by State Court Plaintiffs’ argument primarily because
 12 Plaintiffs have represented that the settlement is justified, in part, by the status of the State Court
 13 Action. Given Plaintiffs’ representation, it is reasonable to await the outcome of the State Court’s
 14 ruling on any demurrer to the State Court Plaintiffs’ second amended complaint so that all class
 15 members have more information to evaluate the proposed settlement. If instead preliminary
 16 approval is granted now, notice to the class will be sent without any mention of the State Court
 17 Action or the claims and damages being asserted, and class members will likely have to submit a
 18 claim, object, or opt-out before the State Court rules on the anticipated demurrers. Allowing the
 19 settlement to proceed in this manner would, as a practical matter, would impair or impede State
 20 Court Plaintiffs’ and other class members’ interests.

21 Further, the cases cited by both Federal Plaintiffs and Eventbrite are distinguishable
 22 because they involved motions to intervene to object to settlements, including motions to
 23 intervene after preliminary approval was granted. *See, e.g., Feller v. Transamerica Life Ins. Co.*,
 24 2018 WL 6025839, at *4 (C.D. Cal. Nov. 16, 2018) (denying motion to intervene that had been
 25 filed a month after settlement had been preliminarily approved); *In re: Volkswagen “Clean Diesel”*
 26 *Mktg., Sales Practices, & Prod. Liab. Litig.*, 2016 WL 4376623, at *4 (N.D. Cal. Aug. 17, 2016)

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(denying motion to intervene that was filed day before court preliminarily approved class action settlement); *Zamora v. Ryder Integrated Logistics, Inc.*, 2014 WL 9872803, at *2 (S.D. Cal. Dec. 23, 2014) (denying motion to intervene that was filed weeks after court preliminarily approved class action settlement). As stated previously, State Court Plaintiffs are not intervening for the purpose of objecting to the settlement. Instead, they seek a relatively short continuance of the hearing on the Motion so that they will be better informed in their evaluation of the proposed settlement. Notably, Plaintiffs and Defendants do not assert that the requested continuance would cause them, or class members, prejudice.

The third requirement for intervention as of right is satisfied.

D. Adequacy of Representation

The burden to show inadequacy of representation is minimal. *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (“The requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.”). Here, State Court Plaintiffs argue that the interests of class members are inadequately represented given that Plaintiffs: (1) negotiated a settlement releasing claims in the State Case without bothering to notify the court-appointed Lead Counsel in the State Case, (2) did not use a mediator, (3) did not seek discovery from Eventbrite (or the State Court Plaintiffs), (4) did not attempt to amend their complaint, despite leave to do so by this Court, (5) mischaracterized the status of the State Case in preliminary approval motion papers (and didn’t even mention the State Case in proposed notices to class members), and (6) now refuse to agree to a short continuance to determine if valuable claims belonging to the Class will be upheld in the State Case.

State Court Plaintiffs’ proffer above is more than sufficient to show that Plaintiffs’ representation of State Court Plaintiffs’ interests in the federal action “may be” inadequate. Further, the damages calculations prepared by each group of plaintiffs are far apart, which also suggests representation “may be” inadequate. According to Plaintiffs’ calculations, their

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maximum § 11 damages are \$33.5 million and their potential § 10(b) damages are \$121.9 million. In contrast, State Court Plaintiffs calculate their potential maximum § 11 damages as between \$67.2 million and \$73.4 million based upon the filing date of the State Court Action, and the potential aggregate § 10(b) damages as between \$163 million and \$206.2 million.

IV. CONCLUSION

For the reasons stated above, State Court Plaintiffs have satisfied the four requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). The motion to intervene is GRANTED, and accordingly the Court will continue the hearing date for Plaintiffs' motion for preliminary approval of class action settlement. The court tentatively sets Plaintiffs' motion for hearing at 9:00 a.m. on March 18, 2021. No later than February 11, 2021, the parties shall submit an updated status report to advise the Court of the status of the State Court Action.

In the event the State Court Action does not proceed on the timeline proposed by State Court Plaintiffs, this Court expects all parties to meet and confer and agree upon a new hearing date for the motion for preliminary approval of class action settlement without engaging in additional motion practice.

IT IS SO ORDERED.

Dated: October 30, 2020



EDWARD J. DAVILA
United States District Judge

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